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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

WILBUR LEE AUERBACH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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on the Petition

QUESTIONS PRESENTED

I. Whether the defendant received a fair trial due to flagrantly prejudicial, repeated instances of prosecutorial misconduct, which denied the defendant his Fifth Amendment right to due process, particularly because the evidence against him was not overwhelming, and the Eighth Circuit did not follow its own standard of review, nor that of the Iowa Supreme Court, nor that of the United States Supreme Court, in evaluating the prejudicial effect of the misconduct on the jury verdict.

II. Whether the defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Wilbur Lee Auerbach respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 6, 1982.

OPINION BELOW

The opinion of the Court of Appeals (Heaney, McMillian and Arnold) will be published at 682 F.2d 735 (8th Cir. 1982), and appears as Appendix A.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was filed on July 6, 1982. (See Appendix A). The petitioner filed no motion for a rehearing by the panel, nor one for a rehearing en banc. The petitioner has not requested nor received an order granting an extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

CONSTITUTIONAL PROVISION:

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner was convicted after a jury trial before the United States District Court for the Southern District of Iowa (Vietor, J.) of engaging in the business of dealing in firearms without a license in violation of 18 U.S.C. §§922(a)(1) and 924(a), and conspiracy in violation of 18 U.S.C. §926(a)(1). He was fined $5,000 on the dealing count, and given a suspended sentence on the conspiracy count, and was placed on probation for a period of three years. The conviction was affirmed by the United States Court of Appeals for the Eighth Circuit.

The petitioner, Wilbur Auerbach, is a sixty-one year old man with no prior criminal record who owns and operates a Standard Service Station in Atlantic, Iowa. At the time of the events in question, his son Tom worked with him at the station.

On March 22, 1979, Special Agents Petersen and Wilber, of the Bureau of Alcohol, Tobacco and Firearms, initiated contact with the Auerbachs by calling Tom Auerbach at the station. The agents then visited the station and purchased a shotgun and a Japanese rifle. To support their theory that the defendants were doing something illegal, and knew that this was not just a casual sale of personal firearms, the agents testified that when they visited the station, the Auerbachs turned off the lights so that it appeared the station was closed. However, this testimony was contradicted by Agent Petersen's own testimony at the hearing on the Motion to Dismiss, and by the testimony of Gary Richter, a former employee of Wilbur's, that the agents came to the station in the afternoon.

Wilbur Auerbach testified that he was not interested in selling to the agents, but only did so after they continually approached him and pressured him to sell. The Auerbachs never initiated contact with the agents, although they had been given the agents' telephone number.

Testimony as to the exact dates was conflicting, but on approximately March

24, the agents again went to the station and purchased a revolver. On March 27 and 28, and April 5, the agents went to the station attempting to purchase firearms, but none were purchased. On April 11, the agents met Bradley Cramer at the station and purchased three rifles from him. The agents testified that they paid Wilbur $20 for introducing them to Mr. Cramer. Cramer was charged with the Auerbachs, but the charges were dismissed by the government for lack of evidence immediately prior to trial. On April 26, the agents went to the station, but no guns were purchased. On May 11, the agents again went to the station to purchase guns. Wilbur went to someone's home and came back with a rifle, which he sold to the agents along with a rifle of his own. This was the last sale made to the agents.

In September, 1979, Agent Petersen shaved off his mustache and beard, completely destroying his undercover appearance. Agent Petersen testified that he periodically telephoned the Auerbachs through October, 1980, but no further purchases were ever made, and no personal contacts were made.

In February, 1981, the case was referred to the U.S. Attorney. On March 25, 1981, two years after the firearms transactions, the Grand Jury indicted Wilbur and Tom Auerbach and Bradley Cramer for conspiracy and firearms violations. As stated above, the charges against Cramer were dropped. The Auerbachs were found guilty. Only Wilbur Auerbach

appealed, and his conviction was affirmed by the Eighth Circuit.

REASONS FOR GRANTING THE WRIT

The defendant did not receive a fair trial due to flagrantly prejudicial, repeated instances of prosecutorial misconduct, which denied the defendant his Fifth Amendment right to due process, particularly because the evidence against him was not overwhelming, and the Eighth Circuit did not follow its own standard of review, nor that of the Iowa Supreme Court, nor that of the United States Supreme Court, in evaluating the prejudicial effect of the misconduct on the jury verdict.

The defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

I. Prosecutorial Misconduct.

The record in this case clearly shows that the prosecutor repeatedly engaged in unfair, prejudicial conduct throughout the course of the trial. He was guilty of numerous violations of the motion in limine granted by the trial judge; of introducing evidence of other crimes; of implying, by his questions, prejudicial facts which were not true; of implying by his questions that the defendants were

guilty of other crimes which they were not and which were irrelevant to this case; of grossly misstating the record in his closing argument; of testifying as to the purpose of the Gun Control Act; of stating prejudicial facts which had no basis in the evidence; of telling the jury that Tom lied about his prior conviction when he had not; of telling the jury that these were the types of weapons used by snipers; of telling the jury that by raising an entrapment defense, the defendants were saying they were guilty of the crime; of telling the jury it was their job to enforce the law; and of withholding information from the defense attorney which should have been disclosed.

It would be impossible without reading the record to realize the full extent of the misconduct. A few examples follow.

During the investigation leading up to the Auerbachs' arrest, the agents' theory was that the defendants were dealing in stolen weapons and other merchandise. However, no such evidence was obtained. The firearms sold by the defendants were not stolen. The guns they sold were Wilbur Auerbach's own personal guns, or on one occasion, a gun owned by an acquaintance. The agents paid for the first two guns they purchased from Wilbur with cash and several electric drills they represented were stolen. On one other occasion, the agents testified they sold Wilbur 30 cartons of cigarettes which they pretended were stolen. Therefore, prior to the trial, the defendants were granted

a motion in limine which prevented the introduction of evidence of the defendants' involvement in the purchase or sale of stolen property unless such evidence was specifically statements by the defendants to the agents that they would trade guns for stolen property. The prosecutor repeatedly violated the motion in limine. He also repeatedly introduced evidence of other crimes, some of which had no relevance whatsoever to this case. The prosecutor questioned Agent Petersen about theft of guns from a sporting goods store, which had nothing to do with these defendants or this trial. He questioned Mr. Cramer about his alleged dealing in stolen firearms, which Cramer denied. He elicited testimony from Agent Petersen that he was investigating potential dealing in stolen firearms, and that he went to the station "to buy hot jewelry and firearms." The prosecutor also elicited testimony from Agent Petersen as to numerous instances of statements by the defendants and Cramer in which they supposedly made remarks implying they dealt in stolen property, none of which had anything to do with trading for guns. He stated, in the jury's presence, that "there has been testimony that Mr. Auerbach is engaged in dealing in stolen property in this Court", which was absolutely false. In his closing argument, the prosecutor commented on all of these things. The clear statement to the jury was that these defendants were "bad men" who, besides dealing in firearms without a license, the crime for which they were accused, dealt in stolen

property. The prosecutor continued to introduce this type of evidence after a motion in limine had been obtained, and after numerous objections by the defense had been sustained. The testimony was highly improper and prejudicial. It "can hardly be characterized as an inadvertent slip of the tongue." U.S. v. Conley, 503 F.2d 520, 523 (8th Cir. 1974).

The Eighth Circuit opinion noted that the defendant did not object to the agents' testimony regarding the sale of cigarettes which had been described as stolen. The Court noted that the evidence was not admissible under any of the exceptions to the general rule that "other crimes" evidence is inadmissible, but stated that the defendant "has not demonstrated that the admission of this evidence so adversely affected substantial rights as to result in a miscarriage of justice." This was not the correct standard of review regarding the admission of this evidence, since the defendant had obtained a motion in limine prior to trial preventing the prosecution from presenting exactly this sort of evidence, and the defense moved for a mistrial at the earliest opportunity to do so out of the presence of the jury. Under Iowa law, once "a motion in limine is resolved in such a way it is beyond a question whether or not the challenged evidence will be admitted during trial, there is no reason to voice objection at such time during trial. In such a situation, the decision on the motion has the effect of a ruling." State v. Miller, 229 N.W.2d 762, 768

(Iowa 1975). Thus, it was error for the Eighth Circuit to follow the standard of review for plain error, particularly when the defense moved for a mistrial as soon as possible. An objection to this prejudicial questioning at the trial would only have served to focus the jury's attention on the testimony. Clearly, the purpose of obtaining the ruling in the first place was that no amount of objection or curative instruction could have removed the prejudicial effect of the evidence on the jury. Admission of this evidence, along with all the rest of the "other crimes" evidence prejudiced the jury against the defendants by telling the jury that they should convict the defendants because they were bad men. See U.S. v. Weir, 575 F.2d 668 (8th Cir. 1978). "[N]othing makes it more difficult for a defendant to receive a fair and unbiased trial than for the jury to think that the defendant or his acquaintances are men of bad character." U. S. v. Clemons, 503 F.2d 486, 491 (8th Cir. 1974), quoting U. S. v. Crawford, 438 F.2d 441, 446 (8th Cir. 1971).

By his questions, the prosecutor on several occasions implied prejudicial facts which were not true. He asked Agent Petersen if Wilbur Auerbach indicated the source of a ring and a watch he offered for sale. The intent of this question was to imply that the articles were stolen, which they were not. The prosecutor asked Special Agent Wilber if Mr. Auerbach had ever registered his gun, implying that he had violated a registration requirement,

which he knew to be nonexistent in Iowa. He asked the agent if he had ever been given a concealed weapons permit for the gun, which had no relevance to this case whatsoever, but which again implied a violation of state laws.

The prosecuting attorney's closing argument contained inflammatory, highly prejudicial remarks calculated to bias the jury. He also made numerous false statements which were unsupported in the record. He testified as to Congress' intent in passing the Gun Control Act. He stated that Tom Auerbach was "the guy who goes out into the community, drums up the business", and stated Tom had called the agents. These statements had no support in the record, and were in fact false, since neither defendant ever approached either of the government agents at any time. The prosecutor stated that Gary Richter, a young man who worked for Mr. Auerbach at the time, corroborated the testimony of the agents as far as it went, and that he could not remember anything else about the transactions. In fact, Gary's testimony was significantly at variance with the agents, and damaging to the prosecution. The prosecutor stated that in most cases, the defendants went out and procured firearms to sell the agents, which was false and unsupported by the record. The prosecutor told the jury that Tom Auerbach lied about his prior conviction, which he had not.

In his rebuttal argument, the prosecutor stated that the types of

weapons sold by the defendants were the types of weapons used by snipers around the country. This was particularly prejudicial, because the trial was held just after the attempted assassinations of President Reagan and Pope John Paul II. This was not a prosecution for possession of illegal weapons, and this remark insinuated that it was. The remark was totally irrelevant to any issue in this case, and its purpose and effect were to arouse the prejudice of the jury. The prejudicial impact on the jury was incalcuable, particularly when combined with the prosecutor's repeated insinuations that there were stolen weapons involved, and that the defendants were bad men who had committed numerous other crimes. In addition, soon after the above remark, the prosecutor told the jury that (1) the defendants were saying that they did the crime by raising the defense of entrapment, and that (2) it was the jury's job to enforce the law.

The misconduct in this case was not "slight, nor confined to a single instance", but "was pronounced and persistent". Berger v. United States, 295 U.S. 78, 89, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Where there are many errors during a trial, the cumulative effect of them must be weighed. See Berger, id.; U.S. v. Bledsoe, 531 F.2d 888, 892 (8th Cir. 1976).

In U.S. v. Weir, 575 F.2d 668 (8th Cir. 1978), the Court considered the effect of improper prosecutorial argument

along with erroneous admission of "other crimes" evidence. The Court stated that the improper argument, standing alone, was not enough for reversal, but that the combined effect was "a presentation to the jury that the defendants were 'bad' men and should be convicted because they were 'bad'", and that reversal of the conviction was required. Id at 672.

In this case, the Eighth Circuit considered the cumulative effect of the prosecutor's improper remarks, but did not consider the cumulative effect of all the errors at trial together. The Court stated:

> We note that the cumulative effect of the prosecutor's improper remarks upon the jury came dangerously close to requiring reversal in the present case. We affirm, however, because of the prompt remedial action taken by the district court and relatively strong evidence. (Emphasis added)

In addition to not considering the cumulative effect of all the errors at trial, the Court erred in assessing the evidence as "relatively strong." At the hearing on the Post-Trial Motions, the District Court judge stated he thought the evidence was not overwhelming, that "certainly it wasn't a strong case", and that "the evidence was not strong on any of the counts", but he felt it was adequate to sustain the jury verdict. In evaluating the effect of prosecutorial

misconduct, the Court is to consider the amount of evidence against the accused. U.S. v. Splain, 545 F.2d 1131, 1135 (8th Cir. 1976). In this case, even the trial judge stated the evidence was not strong. The evidence to show that the defendants were engaged in the business of dealing in firearms was very weak. The evidence merely showed that the defendant sold four of his personal guns to the agents, one gun of an acquaintance, and introduced the agents to Mr. Cramer. The government's evidence was based on the controverted statements of two special agents who made no notes or reports of the transactions until almost two years after their occurrence. If the Eighth Circuit had balanced the cumulative effect of all errors at trial against the weak case against the defendant, it is clear that reversal would have been required.

The standard for evaluating the effect of errors on the jury verdict was stated in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed 1557 (1946):

> And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision...If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict, and the judgment should

> stand...But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to corclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Id., at 764-65 [citations omitted].

The Eighth Circuit has followed the Kotteakos standard in many cases. United States v. Norton, 639 F.2d 427, 429 (8th Cir. 1981); United States v. King, 616 F.2d 1034, 1040 (8th Cir. 1980); United States v. Weir, 575 F.2d 668, 671 (8th Cir. 1978); United States v. Bledsoe, 531 F.2d 888, 891 (8th Cir. 1976); United States v. Conley, 503 F.2d 520, 524 (8th Cir. 1974); Evanson v. United States, 316 F.2d 94, 96 (8th Cir. 1963).

The Eighth Circuit in this case did not evaluate the effect of the errors on the jury verdict whatsoever. Rather, the Court evaluated the errors separately, and used the standard of requiring the defendant to demonstrate that the erroneous admission of other crimes

evidence "so adversely affected substantial rights as to result in a miscarriage of justice." This is the standard which has been used in plain error cases where no objection was made to the introduction of erroneous evidence. See United States v. Segal, 649 F.2d 599 (8th Cir. 1981). In the Auerbach case, defense counsel objected to most of the errors, or had obtained a motion in limine coupled with a motion for mistrial. Therefore, the Court should have evaluated the cumulative effect of the numerous errors on the jury verdict. See Kotteakos, supra at 764-65.

The cumulative effect of the prosecutorial misconduct clearly affected the jury verdict, and prejudiced the defendant's right to a fair trial. Particularly because the evidence of guilt was not overwhelming, the cumulative effect of the error cannot be considered harmless.

The prejudicial effect of the erroneous admission of evidence, repeated instances of prosecutorial misconduct during the trial, and improper closing argument could easily have made the difference between conviction and acquittal. "In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence." Berger v. United States, supra at 89.

Prosecutors must be told that their obligation "in a criminal prosecution is

not that [they] shall win a case, but that justice shall be done." Berger, supra at 88. If they violate this rule, they should receive more than a slap on the wrist. Allowing this conviction to stand would be putting a seal of approval on the prejudicial prosecutorial tactics used in this trial.

II. The defendant's Fifth Amendment right to due process was violated by unreasonable, prejudicial preindictment delay.

Sales of firearms to the agents occurred in March through May of 1979. The indictment was not filed until March 25, 1981, and trial was held during June of 1981. The applicable "statute of limitations does not fully define the [defendant's] rights with respect to the events occurring prior to indictment." United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

In evaluating a Fifth Amendment claim of denial of due process from unreasonable, prejudicial preindictment delay, the Court is to balance the reasonableness of the delay against any resulting prejudice to the defendant. United States v. Barket, 530 F.2d 189, 193 (8th Cir. 1976). The weakness of the case against the defendant is another factor relevant to this balancing process. Id. at 194.

The lower courts held that the preindictment delay was due to ongoing undercover investigations, and was

necessary to protect Agent Petersen's undercover identity. Special Agent Petersen testified that he periodically called the Auerbachs through the fall of 1980. This testimony is unsubstantiated, and no further personal contact or purchases were ever made. In addition, Agent Petersen admitted he shaved off his mustache and beard, thus completely destroying his undercover appearance, in September, 1979. Therefore, there was no need whatsoever to protect the agent's undercover identity after September, 1979, since he, by his own action, destroyed that undercover identity.

Furthermore, the delay was clearly prejudicial to the defendant, considering the particular nature of the charges against him. At the hearing on the Motion to Dismiss, held one month before the trial, Special Agent Petersen stated that he could not recall the specifics of conversations and he would have to rely on his report. (The report was made January 27, 1981 - a year and a half after the events in question.) The report contains very little actual conversation. Yet at trial, Agent Petersen testified to numerous, detailed conversations.

These detailed conversations were the only evidence available to distinguish between a few casual, isolated sales of the defendant's own hunting guns, which is not a crime, and being "engaged in the business of dealing", which is a crime. See, United States v. Baker, 397 F.Supp. 1122, 1123-34 (E.D.Mo. 1975). It was

specific conversation which made the difference between whether the agents kept coming back on their own, or whether Wilbur supposedly kept telling the agents to come back. (Agent Petersen's report says that once Wilbur and Tom said to come back. Agent Wilber's report says nothing whatsoever about coming back.)

Thus, in this particular case, it was actual conversation, not just actions, which convicted the defendant. Without the conversations, there could have been no conviction. Therefore, there was actual prejudice to the defendant from the two-year delay. The defendant could not remember specific conversations two years old clearly enough to assist effectively in his own defense. He was left to prove a negative, that the agents' testimony of specific conversation did not happen.

The defendant's right to due process was violated when the government agents held on to weak information regarding the defendant's involvement in an alleged crime for almost two years without justification. The mere fact that an agent says he is involved in ongoing investigation cannot justify lengthy delay when the agent's own testimony showed he had no undercover identity a few months after the purchases. Additionally, when questioned about the alleged ongoing investigation, he admitted the investigation after May 11, 1979 did not have anything to do with Mr. Auerbach, and that in any investigation after May 11, the agent was only a collateral witness. The

fact that there may have been some investigation somewhere in the Atlantic, Iowa area by the Bureau of Alcohol, Tobacco and Firearms does not justify not turning in the information about these particular defendants when the other investigation had nothing to do with these defendants and there was no need to protect the agent's undercover identity after September, 1979.

Therefore, the indictment against Mr. Auerbach should have been dismissed.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Des Moines, Iowa

August 31, 1982

Respectfully Submitted,

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